

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

PARKASH 751 LLC

and

Cases 29-CA-114742

LOCAL 670, RETAIL WHOLESALE
DEPARTMENT STORE UNION, UNITED FOOD
AND COMMERCIAL WORKERS

*Brent Childerhose, Esq. and Brady Francisco-
FritzMaurice, Esq.*, Brooklyn, NY for the
General Counsel.

Clifford P. Chalet, Esq. (Naness, Chalet and Naness),
Jericho, NY for the Respondent.

Matthew P. Rocco, Esq. (Law Office of Richard M.
Greenspan), Ardsley, NY for the Charging Party.

DECISION

Steven Fish, Administrative Law Judge: Pursuant to charges and amended charges filed by Local 670, Retail Wholesale Department Store Union, United Food and Commercial Workers (the Union), the Director for Region 29 issued a complaint and notice of hearing on January 28, 2014, alleging that Parkash 751 LLC (the Respondent) violated Sections 8(a)(1), (3) and (5) of the Act.

The trial with respect to the allegations in said complaint was held before me on February 25 and 26, 2014 in Brooklyn, NY. Briefs have been filed by General Counsel and Respondent and have been carefully considered. Based upon the entire record,¹ including my observation of the demeanor of the witnesses, I make the following:

Findings of Fact

I. Jurisdiction and Labor Organization

Respondent is a domestic limited liability company with a principal office and place of business, located at 172-14 89th Avenue, Jamaica, New York, and has been managing and renting apartments located at 751 Gerard Avenue, Bronx, NY.

¹ I grant Respondent's post-trial motion to admit Respondent's Exhibits 7 and 8, which were identified at the hearing but inadvertently not offered. General Counsel made no objection to the request. I note the documents have already been included in the record, submitted by the reporting service.

Based on a projection of its operations since September 10, 2013, at which time Respondent commenced its operations, Respondent, in the course and conduct of its business operations, will derive gross annual revenues in excess of \$500,000 and will purchase and receive at its Gerard Avenue location, goods and services valued in excess of \$5000 directly from suppliers located outside the State of New York.

Respondent admits, and I so find, that Respondent had been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

It is also admitted by Respondent, and I so find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Respondent's Operations

Ved Parkash is the sole owner of and member of Respondent. He is also the manager for the building, located at 751 Gerard Avenue, Bronx, which Respondent purchased, as will be described more fully below, on September 10, 2013.²

Parkash owns and operates approximately 55 buildings, 44 of which are located in the Bronx.

Enrique Reyes is a superintendent of one of the buildings owned by Parkash, and Parkash sends Reyes to supervise and check on various aspects of the buildings that Parkash operates and owns. The complaint alleges, and Respondent admits, that Reyes is a supervisor (along with Parkash) of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

III. The Union's Status at 751 Gerard Avenue

The Union has been the bargaining representative for the employees employed at the building, located at 751 Gerard Avenue for over 15 years. Pursuant to that representation, the Union was a party to a collective bargaining agreement, which by its terms was in effect from April 1, 2011 for a period of three years.

The contract was between the Union and seven LLPs, including 751 Gerard Owners, LLC, the prior owner of the building at 751 Gerard Avenue, plus E&M Bronx Associates LLC, which was the managing agent responsible for managing the seven buildings. The contract was signed by Joel Goldstein, with a title of manager on behalf of all of the LLCs.

According to David Green, secretary-treasurer and vice-president of the Union, some of the buildings had only one employee and others up to three, estimating about 14 or 15 employees in total at all of the buildings. The unit specified in the contract is "all employees, excluding supervisory employees employed at the buildings listed in Schedule "A."" Schedule A listed the seven LLCs, including 751 Gerard Avenue.

Green testified that the Union treated each building as a separate unit although the contractual benefits are similar but not identical for each. Thus, the salaries for the superintendents and porters vary from location to location as well as the payments to the Union's welfare, pension and annuity funds.

² All dates, hereinafter, referred to are in 2013, unless otherwise indicated.

The employees at 751 Gerard Avenue were employed and supervised by E&M Associates (E&M) managing agents for the building. The construction manager for E&M was Edmund Melendez. There were three employees employed at the building prior to February of 2013. They were Ronald McDonagh, who was the superintendent (super) since November of 2010, Vicente Leon, who was employed as a handyman, and Winston Rodriguez, a porter.

McDonagh as the super received a free apartment (Apt. 1L) with free electric and gas, plus use of a cell phone. He received a salary of \$600 per week.

Rodriguez and Leon both lived in a basement apartment. According to McDonagh, the porter and handyman were living in that basement apartment before McDonagh got there, and the handyman had been living there for seven years.

In February of 2013, E&M terminated the employment of Rodriguez and Leon. They were replaced by Ruben Gomez (porter) and Francisco --- (handyman). At that time, Gomez and Francisco moved into the basement apartment.

Sometime in July of 2013, E&M transferred Francisco to another building. Thereafter, Gomez continued to live in the basement apartment.

IV. Respondent Purchases the Building

On May 9, 2013, Parkash, the sole member of Respondent, entered into a contract of sale with 751 Gerard Owners LLC to purchase the building, located at 751 Gerard Avenue, Bronx for \$10,000,000 dollars. The contract of sale made no mention of the Union or any union for that matter as a representative of any of the employees at the building.

The contract of sale listed the apartments in the building and indicated who the tenant was and whether the apartment was vacant as well as the rent for each apartment.

The list of apartments in the contract of sale does not list a basement apartment, where Gomez was living and where previous E&M employees lived. It does list a different basement apartment, occupied by a tenant, Allison Cruz, with a rent listed as \$1680.81.

The contract lists 1L as "the Super's Apartment" with no name listed as a tenant. It also lists 0 as rent for this apartment. McDonagh was living in the apartment in May of 2013 and was the super, but the record does not reflect why his name is not listed in the contract of sale.

Prior to signing the contract of sale, Parkash went to the building and spoke to McDonagh.³

At that time, McDonagh received a call from E&M that Parkash would be coming to view the building because he was considering purchasing it. Parkash met with McDonagh and informed him that he was in the process of looking to buy the building, and they did a walkthrough. They walked through the basement, the boiler room, the floors and the backyard.

³ While McDonagh testified that he believed that the conversation was in June and Parkash testified that it was in May, this discrepancy is of no consequence since both witnesses agree that the conversation occurred prior to Parkash agreeing to purchase the building.

During this walkthrough, Parkash asked McDonagh if this is a union building. McDonagh replied yes. Parkash then asked how many employees were in the building. McDonagh replied that there were three.

5 The closing on the building took place on September 10, 2013.

V. Respondent Hires McDonagh and Gomez

10 On September 11, the day after the closing, McDonagh and Gomez were notified to come to Parkash's office in Jamaica, NY to meet with him. They drove together to the office as instructed. The meeting took place at 11:00 AM, and no one else was present. Parkash spoke to the employees in English, and McDonagh, who speaks Spanish, translated to Gomez. Parkash told the employees that there was no more union in the building and that he didn't accept the union in his buildings. Parkash told the employees how much money he was willing to pay them.

15 Parkash told McDonagh, who had been paid \$600 at E&M, that he would be paid \$300 per week. Gomez, who had been paid \$500 by E&M, was to receive \$290. McDonagh complained that the reduction in pay wasn't right, but, ultimately, the employees conferred and agreed to accept the jobs.

Parkash also told McDonagh that he would receive a free apartment as he had while working for E&M, plus free electric and gas.

25 Parkash also told McDonagh that the super's job is to perform all repairs and fix up the empty apartments. Also, when a tenant moves out, the super would be required to clean out the apartment with the porter.

30 Parkash additionally informed McDonagh that if he was asked to renovate an empty apartment that Respondent would give the super extra money depending on the job. Parkash did not specify how much extra he would pay for this extra work, which Parkash conceded would be above his regular superintendent responsibilities.

35 After the meeting, McDonagh telephoned Green and informed what Parkash had said to the employees. Green informed McDonagh that what Parkash had done was wrong, and any negotiations should be brought to the Union. Green told McDonagh to keep on working and that he (Green) was going to send some paperwork to take care of the issues.

40 My findings with respect to the above conversation between Parkash and the employees are based on a compilation of the credited portions of the testimony of McDonagh, Gomez and Parkash. For the most part, I have credited the mutually corroborative testimony of McDonagh and Gomez on areas of dispute, particularly, whether or not Parkash mentioned the Union during the discussions. I also rely on the corroborative testimony of Green as to what McDonagh reported to him concerning Parkash's comments to the employees on September 11. Green informed him that Parkash propositioned the employees to leave the Union, which is consistent with the employees' version of the conversation. Although Green's testimony is hearsay, it is well-settled that the Board will admit and rely on hearsay evidence, "if rationally probative in force and if corroborated by something more than the slightest amount of other evidence." *Dauman Pallet Inc.*, 314 NLRB 185, 186 (1994); *RJR Communications*, 248 NLRB 920, 921 (1980); *Livermore Joe's*, 285 NLRB 169, fn. 3 (1987). Therefore, I find it appropriate to rely on Green's testimony as supportive of the testimony of McDonagh and Gomez that Parkash did made comments to them about the Union during their September 11 meeting, contrary to

Parkash's testimony that he made no mention of the Union at this meeting.

VI. The Union Requests Recognition

5 On September 17, the Union requested recognition and bargaining with Respondent, by sending the following documents.

10 September 17, 2013

FEDERAL EXPRESS AND FASCIMILE
Parkash 751 LLC
172-14 89th Avenue
15 Jamaica; NY 11432
Attention: Ved Parkash

20 Regarding: Stationary Engineers, Firemen, Maintenance and Building Service Union,
Local 670, RWDSU, UFCW - and - (Collective Bargaining Negotiations:
751 Gerard Avenue, Bronx

Dear Sir/Madame:

25 As you know, Stationary Engineers, Firemen, Maintenance and Building Service Union, Local 670, RWDSU, UFCW ("Local 670") represents the building service and maintenance employees employed by 751 Gerard Owners LLC c/o E&M Associates ("Employer") at 751 Gerard Avenue, Bronx.

30 Accordingly, Local 670 is hereby requesting that the Employer continue bargaining on a renewal collective bargaining agreement with Local 670 setting forth the terms and conditions of employment for the aforementioned bargaining unit employees. We also note that Local 670 has made its second contract proposal in this matter. This request is being made pursuant to the National Labor Relations Act, as amended.

35 Please be advised that Local 670 is available to negotiate on the following dates: September 25th and 27th. If none of these dates are convenient for the Employer, please feel free to offer alternative dates.

40 Please contact the undersigned directly regarding this matter.

Very truly yours,

David Green
Union Representative

45 cc: Thelma Winston, President, Local 670
Richard M. Greenspan, P.C.

50

September 17, 2013

Parkash 751 LLC
172-14 89th Avenue
Jamaica. NY 11432

Re: NEW OWNER/MANAGEMENT
751 Gerard Avenue, Bronx
Shop# 753 B

Dear Sir/Madam:

It has come to the attention of this Union that you are the new owner/managing agent for the above stated building.

Enclosed is an assumption agreement whereby your signing this letter indicates you confirm and recognize Stationary Engineers/Local 670 as the Union for the building stated above and the current Union contract in effect for this building.

Upon signing this agreement, please return it promptly to this office for final signature by the Union. We shall then return a signed copy to you for your records.

If you have any questions, please feel free to contact David Green, Union Representative at the Union office at the above telephone number.

Thank you for your cooperation.

Very truly,

Local 670

ASSUMPTION AGREEMENT

RE: 751 Gerard Avenue, Bronx - Shop # 753 B

It is hereby agreed by and between Stationary Engineers, Firemen, Maintenance and Building Service Union, Local 670, RWDSU, UFCW (LOCAL 670) and Parkash 751 LLC that 751 Gerard LLC (new owner/mgmt.) assumes the collective bargaining agreement between Local 670 and 751 Gerard Owners LLC c/o E & M Associates (old owner/mgmt.) dated July 1, 2009 (commencement date) through June 30, 2012 (expiration date) and agrees to comply with all terms, conditions and provisions thereof.

DATED: September 17, 2013
New York, New York

BY: Thelma Winston [handwritten signature]
Stationary Engineers, Firemen,
Maintenance and Building Service
Union, Local 670, RWDSU, UFCW

ADDEMDUM BY: _____
 751 Gerard LLC
 Owner/Management
 Owner's/Management Address
 712-14 89th Avenue
 Jamaica, NY 11432
 Telephone Number
 (718) 658-8087

15. Grievance and Arbitration
 Note: Any Grievance not brought by the Union and/or Employee within one (1) year of occurrence shall be deemed waived.

EMPLOYEE'S LIST FOR THE BUILDING

RE: 751 Gerard Avenue, Bronx - Shop # 753 B

| EMPLOYEE'S NAME | ADDRESS | TEL. NUMBER | POSITION |
|-----------------|---------|-------------|----------|
| 1. _____ | _____ | _____ | _____ |
| 2. _____ | _____ | _____ | _____ |
| 3. _____ | _____ | _____ | _____ |
| 4. _____ | _____ | _____ | _____ |
| 5. _____ | _____ | _____ | _____ |

PLEASE NOTE: THIS FORM MUST BE COMPLETED
 AND RETURNED TO THIS OFFICE IMMEDIATELY.

ATTENTION!

IF YOU DO NOT SIGN THIS ASSUMPTION AGREEMENT, YOU ARE IMPLYING
 THAT YOU HAVE REFUSED TO BARGAIN WITH THIS UNION AND CHARGES WILL
 BE FILED WITH THE NEW YORK STATE LABOR RELATIONS BOARD.

PLEASE RETURN THIS LETTER WITHIN TEN (10) BUSINESS DAY FROM THIS
 DATE: September 17, 2013

THANK YOU,
 LOCAL 670, RWDSU, UFCW

IN BY: October 2, 2013

DO NOT WITHDRAW

On October 2, Respondent, by letter from its counsel, responded to the Union's letters,
 as follows:

October 2, 2013

By Facsimile Transmission
 To (212) 385-0208 and
 Regular First Class Mail

David Green, Secretary-Treasurer
Local 670 RWDSU UFCW
299 Broadway, Suite 1000
New York, New York 10007

Re: 751 Gerard Avenue
SECOND RESPONSE

Dear Mr. Green:

Our firm is counsel to Mr. Ved Parkash, a principal of Parkash 751 LLC, the new owner of a building at 751 Gerard Avenue, Bronx, New York. I am writing in response to the letters that were faxed to Mr. Parkash from your office on September 18, 2013.

Please be advised that your letters of September 18, 2013 were the first indication that Mr. Parkash had of your claim of representational status at 751 Gerard Ave. Further, other than the representations in the letters, Mr. Parkash has no knowledge or proof that Local 670 represents any of the employees at that location.

Having not been advised of your claimed status as the collective bargaining representative, and having no evidence to support Local 670's claim, Mr. Parkash is not disposed to assume any agreement you may have had with the previous owner. Further, Mr. Parkash, as is his right under the National Labor Relations Act, set the initial terms under which the current employees will be employed prior to receiving your letters and without knowledge of your claimed status.

That being said, if you have any documents that establish Local 670's claimed status as the collective bargaining representative of the employee(s) at 751 Gerard Avenue, I will be happy to review them with Mr. Parkash, and to respond, in a more informed fashion, to your request to bargain.

Yours,

Clifford P. Chalet

cc: Mr. Ved Parkash
172-14 89th Avenue
Jamaica, N.Y. 11432

On October 11, the Union's counsel responded by the following, which also attached checkoff authorization cards and membership cards, signed by Gomez and McDonagh on September 10 and September 11, respectively.

October 11, 2013

Via Fax (516-827-0202) & Regular Mail

Cliff Chalet, Esq.
Naness, Chalet & Naness, LLC
375 North Broadway, St. 202
Jericho, NY 11753

Re: Parkash 751 LLC - and - Local 670 RWDSU UFCW

Dear Mr. Chalet:

This firm is counsel to Local 670 RWDSU UFCW (the "Union"). Reference is made to your letter dated October 2, 2013 where you request documents that establish that the union has the support of the majority of employees in the bargaining unit at 751 Gerard Avenue. In response to your request, enclosed are checkoff authorization cards and membership applications for two unit employees. If you have any questions, please do not hesitate to directly contact me.

Very truly yours,

Matthew P. Rocco
For Law Offices of:
Richard M. Greenspan, P.C.

Encls.

cc: David Green (via e-mail & fax)

The Union did not forward to Respondent a copy of its collective bargaining agreement with E&M and 751 Gerard Avenue Owners LLC, as described above.

VIII. Respondent Discharges McDonagh and Gomez

On September 30, Supervisor Reyes handed McDonagh a termination letter, which was dated September 27, discharging him effective September 30. The letter reads:

Parkash 751 LLC
172-14 89th Ave
Jamaica, NY 11432-4634
(718) 658-0205 / (718) 658-0445 - fax

9/27/2013

Ronald William McDonagh
751 Gerard Avenue #1L
Bronx, NY 10451

Re: Termination of Employment

Dear Mr. McDonagh:

Effective 9/30/2013 your employment as superintendent at the premises located at: 751 Gerard Avenue, Bronx, NY 10451, is hereby TERMINATED.

Your termination is the consequence of:

Your inability to perform the job functions + requirements of being a superintendant properly.

Please vacate the apartment #1 L immediately at the premises 751 Gerard Avenue, Bronx, NY 10451.

Finally, you must give all the keys to the building to the new super immediately.

If you have any further questions, please feel free to contact me at the above number.

Thank you.

Yours truly,

Ved Parkash
Landlord/Owner of Parkash 751 LLC

Reyes told McDonagh that the letter came from Parkash, that “you know something had happened, it wasn’t his fault, it was just from Mr. Parkash, who made the decision.”

According to McDonagh, Parkash never explained to him why he was fired. Reyes never criticized McDonagh in any way for his work performance and, in fact, had told McDonagh that he was doing fine. Reyes would tell McDonagh to make sure things were cleaned up or what repairs needed to be done but never criticized McDonagh about any failures to perform any assignments.⁴

On October 6, Reyes informed Gomez that he didn’t work for Respondent anymore. He handed Gomez the following termination letter.

Parkash 751 LLC
172-14 89th Ave
Jamaica, NY 11432-4634
(718) 658-0205 / (718) 658-0445 - fax

10/6/2013

Ruben A. Gomez
2010 Grand Avenue #Bsmr
Bronx, NY 10453

Re: Termination of Employment

Dear Mr. Gomez:

Effective 10/6/2013 your employment as "Porter" at the premises located at: 751 Gerard Avenue, Bronx, NY 10451, is hereby TERMINATED.

Your termination is the consequence of:

Your inability to perform the job functions + requirements of being a "Porter" properly.

Effective 10/6/2013, you do not have the authority to enter the subject premises as the "Porter."

Finally, you must give all the keys to the building and all other items that belong to the

⁴ The above is based on the undenied testimony of McDonagh. Reyes did not testify.

Landlord to the new super immediately.

If you have any further questions, please feel free to contact me at the above number.

5 Thank you.

Yours truly,

10 Ved Parkash
Landlord/Owner of Parkash 751 LLC

15 Gomez had never been disciplined nor criticized by Reyes about his work, nor had he ever refused or failed to perform his job responsibilities or that his job performance was not up to par. In fact, three days before he was fired, Reyes asked Gomez if he was interested in being super in the building. Gomez asked how much it paid and if he would get a helper. Reyes replied that Gomez would not get a helper but that Respondent would pay \$350 to do extra work.⁵

20 Respondent's primary witness, Parkash, provided testimony that when he purchased the building and when he hired the two employees, Gomez and McDonagh, he was not aware that the employees had been represented by the Union when they were employed by the predecessor employer.

25 Parkash also provided testimony as to why he decided to terminate McDonagh and Gomez. According to Parkash, he terminated McDonagh because he failed to perform his job properly, and more specifically, he failed to follow Parkash's instructions to clean and repair several apartments, so that the apartments could be rented.

30 According to Parkash, on the date of his hiring McDonagh (and Gomez) on September 11, 2013, he informed McDonagh that he would be coming to the building to inspect the vacant apartments on Friday, September 13. Parkash asserts that he called McDonagh on September 12 and advised him that he would be at the building at 10:30 AM on September 13 and that McDonagh advised Parkash that he would be there at that time.⁶

35 Parkash arrived at the building at 10:30 AM on September 13 along with Evelyn Roman, one of Parkash's field supervisors, Reyes and Segundo Lliguicota (a supervisor at another of Respondent's buildings) arrived at 751 Gerard Avenue.

40 McDonagh was not there. At Parkash's direction, Lliguicota went to McDonagh's apartment and knocked on the door. He spoke to McDonagh's wife, and she advised him that McDonagh was not there. He informed McDonagh's wife that Parkash wanted to see McDonagh. His wife tried to call him but could not reach him. Parkash also tried to call McDonagh but could not reach him and left messages on his voicemail. At some point, McDonagh's wife came out and informed Respondent's representatives (Roman and Lliguicota) 45 that she had heard from McDonagh, and he would be there "in a few minutes." However,

⁵ Again, the above discussion is based on the undenied testimony of Gomez. As noted, Reyes did not testify.

50 ⁶ According to McDonagh, while Parkash initially told McDonagh that he would meet him at 10:30 AM, after McDonagh said that he would not be there at 10:30 AM, they arranged to meet at 2:00 PM.

McDonagh did not appear, and Respondent's representatives left the building at 1:30 PM.

Parkash also testified that on September 13 as well as on September 14 when he again went to the building, he noticed that the building was dirty and did not look like it had been
 5 cleaned. According to Parkash, when the porter is off, it is the responsibility of the super to clean the building.⁷

On September 15, Parkash called Reyes and asked him to check on the building to see if it was cleaned. Reyes reported to Parkash at 2:00 PM that the porter had mopped and
 10 cleaned the building.

On Monday, September 16, Parkash went to the building once again. This time, he was accompanied by Danilda Cabrera, a secretary-receptionist in Respondent's office, Lliguicota and Reyes.
 15

They met with McDonagh on that date and inspected the vacant apartments.

The first apartment that was viewed was Apartment 1A. This apartment had been completed but was missing only a stove and a refrigerator. Parkash subsequently provided a
 20 stove and refrigerator for the apartment, and it was ready for new occupants.

Apartment 3N was the next apartment viewed. Parkash advised McDonagh that this apartment needed to be made ready expeditiously since Respondent had already rented this apartment. Most of the work on this apartment had been completed by a private contractor, but
 25 it still needed a few minor adjustments, including installation of electrical outlet covers and replacement of light switches and installation of a smoke detector. The apartment also needed a stove and refrigerator, which Parkash informed McDonagh that he will send right away. McDonagh assured Parkash that he will do the tasks assigned to him.

The third apartment inspected was Apartment 4C, which was another apartment that Respondent had already rented and that Respondent had accepted a deposit. This apartment had been worked on by McDonagh while he was employed by E&M, and according to McDonagh, was 95% completed. McDonagh asserts that he turndown the sheetrock, assisted
 30 the plumber with plumbing work, put up new sheetrock, lighting and closets and put tiles in the bathroom. A new sink basin and cabinets were put in, and the windows were replaced. The work that needed to be completed included a door for the bathroom, which Parkash provided, and some tile grout work. According to McDonagh, he informed Parkash that he needed tile grout in order to finish this job.⁸ Parkash asked McDonagh how long it would take to finish this apartment. McDonagh responded two or three days.
 35

However, testimony from Cabrera differed from McDonagh with respect to the status of this apartment. According to Cabrera, the apartment was a "total mess," there was no electricity in the apartment, wires were visible out of the walls, the bathtub was full of cement and a machine used to cut ceramics, plus the materials, were left in the living room.
 40

Apartment 5F was the next apartment viewed. There was a marshal's eviction notice on the door of this apartment, dated March 14. The apartment was a total mess with pots and pans
 45

⁷ The porter was off on September 14.

⁸ According to McDonagh, he also had to install the sink, which was already in the apartment, but he needed to complete the grout work before installing the sink.
 50

scattered around and garbage still inside the apartment. Parkash asked McDonagh how come the apartment was not cleaned up since the eviction notice was dated March 14. McDonagh explained that the property of the prior tenants had been left behind and that he was waiting for instructions from E&M as to whether he was going to be assigned to remodel or refurbish this apartment. According to McDonagh, the prior practice was that E&M would leave the things in the apartment for a period of time after the eviction to see if the people were going to return or to reclaim their items. E&M Management would decide how and when to renovate the apartment. He was told by E&M to leave the stuff in the apartment until further notice.

Parkash told McDonagh that he wanted McDonagh to clean out the apartments. McDonagh responded that he would do it. There was no discussion about how long it would take or when he would be finished.

The next apartment viewed was Apartment 3J. This apartment was empty but was dirty. Parkash did not testify about giving any instructions to McDonagh about this apartment.

Apartment 6J was next and had been vacated by the previous tenants without letting E&M know. The tenants left all their furniture in the apartment as well as several personal items. There was a court case, and the tenant owed the landlord \$25,000.

Apartment 6K was a marshal eviction. In this apartment, the tenant had left a table, some chairs and a bed. Parkash wanted McDonagh to bring everything down from Apartment 5F, 6K and 6J (as well as Apartment 4C) and to put the stuff in the backyard. According to McDonagh, at that point, the furniture would be "little by little" taken out to the street for pick-up by the sanitation department. McDonagh asserts that he informed Parkash that he needed assistance to do this work since he had a backlog of his normal work as a super. Thus, he needed some help to perform this assignment.

McDonagh also testified that Parkash informed him that he wanted McDonagh to pay the NYC sanitation employees to take the garbage, which in McDonagh's view, was against the law. He asserts that he told Parkash that he would not do that since he would not violate the law.

The next day, September 17, Parkash visited the building again along with Roman, Reyes and Lliguicota at about 1:00 PM. McDonagh was not present, but Gomez was there. Roman translated for Parkash and asked Gomez if he had the keys to Apartments 6J and 6K. Gomez replied yes, and they went to inspect these apartments. Both of these apartments were still filled with belongings of the previous tenants. Through Roman, Parkash instructed Gomez to make sure to tell McDonagh to clean out these two apartments. Gomez responded to Roman in Spanish that he will tell the super.

At around 3:15 PM as Parkash was leaving the building, he ran into McDonagh coming in the back door. Parkash informed McDonagh that Apartment 3N needed electrical plates, smoke detectors and carbon monoxide detectors. He told McDonagh that the apartment was rented and that he had to get it ready for people to move in.

Parkash also mentioned Apartment 4C and that Respondent had a deposit for that apartment and that McDonagh needed to get it ready very soon. McDonagh responded that he will do what Parkash instructed him to do in these two apartments.

On September 18, Parkash asked Reyes to go to the building and see if any of these apartments had been completed by McDonagh as Parkash had instructed. Reyes reported to Parkash that he (Reyes) had inspected the vacant apartments, and nothing had been done.

On September 19, Parkash again went to 751 Gerard Avenue and arrived at about 1:00 PM. He was accompanied by Cabrera and Reyes. They met McDonagh in the lobby. Parkash first asked to see Apartments 3N and 4C (which were the two apartments that Respondent had already rented). Both of these apartments were in the same condition as they had been when originally inspected, and McDonagh had not completed the task assigned to him by Parkash previously. Parkash informed McDonagh that he was very upset and that McDonagh was not doing his job. Parkash added that if this work is not done by tomorrow, McDonagh will be terminated.

McDonagh replied that he will work the next few days and get these apartments ready.

On September 21, Parkash went to the building to inspect Apartment 3N. He noticed that the work had been done on this apartment as instructed by Parkash, and the apartment was ready for occupancy.

On Monday, September 23, Parkash returned to the building and met with McDonagh, and they inspected Apartments 4C, 5F, 6J and 6K. Nothing more had been done by McDonagh in Apartment 4C as instructed, and it was still not ready for occupancy. Apartments 5F, 6J and 6K had not been cleaned out, and none of the properties from the departing tenants had been removed. Parkash asked McDonagh to tell him how many days he needs to finish Apartment 4C and remove the garbage from Apartments 5F, 6J and 6K. McDonagh responded that he should be given 4 or 5 days until September 27, and everything will be corrected. Parkash replied okay, I have no problem with that.

On September 28, Parkash returned to the building with Reyes and Lliguicota. They met with McDonagh and inspected the four apartments, 4C,⁹ 5F, 6J and 6K. Parkash observed that nothing more had been done in any of these apartments and that McDonagh had not met his commitment to perform the work that he had been instructed to perform by September 27. Parkash informed McDonagh that he was very disappointed with McDonagh's work and that he (Parkash) "was going to terminate you." McDonagh responded that he doesn't care, "he belongs to the Union."¹⁰

After terminating McDonagh, Parkash contracted with Ajay Construction Company, a contractor, to complete the renovation work needed to get Apartment 4C ready for rental. According to Parkash, Ajay completed the necessary work over 2 or 3 days during the first week of October. The invoice, which Ajay submitted to Respondent, dated October 18, 2013, reveals as follows:

⁹ Parkash admitted that the work that he had asked McDonagh to perform on Apartment 4C was primarily extra renovation work that was above and beyond his regular superintendent duties.

McDonagh testified that he did not clean out apartments 5F, 6J and 6K because he was waiting for the help that he had asked for. He believed that the four individuals sent in by Respondent to clean these apartments were the help that he had requested.

¹⁰ As detailed above, McDonagh was handed his termination letter by Reyes on September 30 at the building.



Ajay Construction
Specializing in Home Improvement
139-11 115 Avenue
Jamaica, NY 11436

Invoice 0108

347-870-1026

TO Ved Parkash

DATE 10/18/2013 ESTD 4C

JOB NAME

JOB LOCATION 751 general Ave

ITEMS

| | DESCRIPTION | PRICE | AMOUNT |
|--|--|-------|--------|
| 1 | RegROUT bathroom wall and floor | | |
| 2 | Install bathroom vanity | | |
| 3 | Install bathroom and bedroom doors and moulding. | | |
| 4 | Finish electrical work in entire apartment | | |
| 5 | Install shelves and pole in closet | | |
| 6 | Touch up paint in entire apartment | | |
| 7 | Install additional kitchen cabinet | | |
| 8 | clean up entire apartment. | | |
| <p> <i>Paid</i> <i>11/4/13</i> </p> <p> <i>R</i> Est. No: <u>8</u> Received <input checked="" type="checkbox"/> Rejected <input type="checkbox"/> Case No.: <u>29-CA-114742</u> Case Name: <u>Parkash 751 LLC</u> No. Pgs: <u>2</u> Date: <u>2-26-14</u> Rep.: <u>am</u> </p> | | | |
| | | | 650 |

Thank You

After terminating McDonagh, Respondent assigned Lliguicota to be the temporary super for 751 Gerard Avenue.¹¹ Parkash instructed Lliguicota to get a crew together to empty out the furniture, pots and pans, garbage and other items from Apartments 5F, 6J and 6K. Lliguicota arranged for four people to come in and empty out the apartments and put the items into the backyard. The four individuals, plus Lliguicota, removed items from the three apartments on October 5. The contents were placed in garbage bags, and then gradually the individuals brought the garbage bags into the street for pick-up by the NYC sanitation department.

Parkash also provided testimony concerning his decision to terminate Gomez. According to Parkash, after Respondent terminated McDonagh, Gomez stopped his work. Parkash asserts that during the week after McDonagh's discharge, Gomez came in on the first day for two hours and then disappeared and did not mop the building nor sweep the building. Parkash testified further that the second day, Gomez came in for two hours, picked up a little garbage and failed to clean the building and did not mop. Further, Parkash asserts that on the third and fourth days after McDonagh's discharge, Gomez again came in for one hour and did not clean or sweep the building.

Therefore, Parkash testified that he decided to terminate Gomez for this conduct. Parkash added that he tried to call Gomez on the phone during these four days but could not reach him, although he left messages for Gomez.¹²

Parkash testified further that Lliguicota and Reyes were giving him reports that the building was getting dirty and Gomez could not be found. Parkash added that on that Friday before the termination, he phoned Lliguicota and told him to make sure to arrange for some people to come in and mop and clean the building. According to Parkash, Lliguicota sent two people to clean up and mop the building, and on Sunday, the building was clean.

Notably, although Lliguicota testified about other matters, he did not corroborate any of Parkash's testimony about the above alleged reports by Lliguicota to Parkash about Gomez's alleged failure to work and failure to mop and clean during that week as testified to by Parkash.

Similarly, as noted above, Reyes did not testify, so he, therefore, also did not corroborate Parkash's testimony that Reyes reported to him that the building was getting dirty and Gomez was not doing his job and not mopping or keeping the apartment building clean after McDonagh was terminated.

Gomez testified that during this last week of work, he continued performing his cleaning and mopping duties as he had been doing prior to that time.

Later on, in his testimony, Parkash added that he terminated Gomez also because Gomez was living in an illegal apartment. Parkash also testified that he was unaware that Gomez was living in the basement apartment at 751 Gerard Avenue when he bought the building or when he offered Gomez the job. Cabrera testified that when she accompanied Parkash to the building on September 16, she translated a request from Parkash to Gomez, wherein Parkash asked Gomez his current address where he lives and his phone number. Gomez gave his address on Grand Avenue in the Bronx and wrote down his phone number. Gomez did not tell either Cabrera or Parkash that he was living in the basement apartment at

¹¹ Lliguicota was and still is the super for the building located at 825 Gerard Avenue, which is located across the street from 751 Gerard Avenue.

¹² Parkash's phone records reveal one phone call to Gomez's phone during this week.

751 Gerard Avenue. However, Cabrera testified that she had noticed when she was at the building that the door in the basement was locked and was not opened by the employees. Thus, Cabrera testified that since they had not opened that door that she believed that someone was living there. She recalls informing Parkash that she believed that someone is living there and
 5 “there is something going on.” According to Cabrera she had asked Gomez if anyone had a key to the basement apartment, and Gomez told her that they did not have the key to that apartment. Cabrera’s testimony continued following questions and answers:

JUDGE FISH: Do you ask him who was living there if anybody?

10 THE WITNESS: No, because I didn’t -- I know how things operate in these buildings when it comes to the basement. Whenever there’s a small little room there that nobody is occupying or it’s not really being used in the building they usually rent it out or have somebody just, you know, live there. This is common, especially in the Bronx in the basements. When
 15 there are like little storage rooms that they are not really being used, this is common, because we have discovered that in other buildings.

JUDGE FISH: That what?

20 THE WITNESS: That some --

JUDGE FISH: It’s somebody who lived here?

25 THE WITNESS: No, sometime if a porter is not with an apartment with a room --

JUDGE FISH: You mean an employee?

THE WITNESS: Yeah, an employee, yeah.

30 JUDGE FISH: Employee decides --

THE WITNESS: Of the building, yes.

JUDGE FISH: -- to move in there.

35 CONTINUED DIRECT EXAMINATION

BY MR. CHAIET:

40 Q: Are these [sic] legal apartment?

A: No. Not that I know. From my experience, no.

45 When Cabrera reported her suspicions to Parkash, he replied that he hadn’t noticed and did not see the room. Cabrera also testified that once in another building owned by Parkash a porter was living there without Parkash’s knowledge. At the time, Parkash told the employee that he couldn’t live there and needed to find another place to live. The porter continued to work at the building but couldn’t live any longer in the building.

50 After Cabrera’s comments to Parkash about the apartment, Parkash instructed Lliguicota to open up each and every room in the basement and see if anyone is living there. Parkash further testified that Lliguicota informed him on or about at October 4 that Gomez was living in

the basement apartment.¹³

Parkash admits that he never spoke to Gomez about living in the apartment and that he never asked him to leave the apartment before Respondent terminated him. After the termination, Respondent and Gomez's attorney agreed on a stipulation that Gomez would be allowed to live in the apartment, but Gomez would pay rent to Respondent while he continued to reside there.

After Gomez was terminated, Respondent utilized Francisco Maza-Garcia, who lived in Parkash's building at 825 Gerard Avenue in a basement apartment, to work 10 hours a week at 751 Gerard Avenue. Maza-Garcia did not have an apartment at 751 Gerard Avenue while he was working there, and he continued to live at 825 Gerard Avenue. However, Maza-Garcia does keep a mattress in the basement of 751 Gerard Avenue, where he rests sometimes.

VII. Analysis and Conclusions

A. The Alleged 8(a)(1) Conduct

Parkash met with Gomez and McDonagh on September 11 to discuss their being hired as Respondent's employees. Parkash informed the employees how much salary he was willing to pay them and that McDonagh (as super) would receive a free apartment. Parkash also told Gomez and McDonagh that there was no more union in the building and that he didn't accept the Union in his buildings.

These latter comments by Parkash that there was no more union in the building and that he didn't accept the Union in his building are unlawful threats in violation of Section 8(a)(1) of the Act. *Pressroom Cleaners*, 361 NLRB #57 slip op at fn. 2, ALJD slip op at 24-26 (2014) (respondent was non-union, does not work with unions, does not deal with unions); *Smoke House Restaurant*, 347 NLRB 192, 203 (2006) (telling applicants that it intended to reopen the restaurant as a non-union business entity); *Advanced Stretchforming International*, 323 NLRB 529, 530-531 (1997), enfd. in relevant part 233 F.3d 1176 (9th Cir. 2000), cert. denied 534 U.S. 948 (2001) (telling employees at meeting that there would be no union); *Williams Enterprises*, 301 NLRB 167 (1991), enfd. in relevant part 956 F.2d 1226, 1234 (DC Cir. 1992) (statement by potential successor employer that it "intended to operate the Richmond plant as a non-union plant).

Accordingly, based upon the above analysis and precedent, I conclude that Respondent has violated Section 8(a)(1) of the Act by Parkash's statements to McDonagh and Gomez.

B. The Refusal to Recognize and Bargain with the Union

The record reflects that the Union was a party to a collective bargaining agreement with a group of building owners and managing agents that included 751 Gerard Owners LLC and E&M Bronx Associates LLC, the seller and former owner of the property purchased by Respondent.

Respondent hired Gomez and McDonagh as its employees on September 11. Both

¹³ Lliguicota corroborated Parkash concerning this testimony as well as the fact that he had discovered that Gomez was living there and that Gomez had threatened to call the police if he broke down the door.

Gomez and McDonagh had been employed by E&M and were union members and covered by the above described collective bargaining agreement while employed by E&M.

The Union demanded recognition and bargaining from Respondent on September 17. The documents sent by the Union request that Respondent sign an assumption agreement recognizing the Union and that the current contract is in effect for the building and that it commence bargaining for a renewal collective bargaining agreement for the employees.¹⁴

Respondent replied by letters from its attorney on September 19 and October 2, wherein Respondent refused to recognize the Union and refused to sign any assumption agreement. The letter further asserted that Respondent, as is its right, “set the initial terms under the current employees will be employed prior to receiving your letters and without knowledge of your claimed status.” Additionally, the letter requested any documents or proof of the Union’s status or that the Union represents any of the employees at the location.

The Union responded on October 11 by submitting checkoff authorization cards and membership applications, signed by Gomez and McDonagh.

Respondent admittedly had refused to recognize and bargain with the Union, asserting that it lawfully terminated both Gomez and McDonagh prior to its receipt of their signed checkoff authorization and membership cards after October 11.

While the terminations of both Gomez and McDonagh are alleged to be unlawful and will be discussed and evaluated below, those issues are irrelevant to the issue of Respondent’s obligation to recognize and bargain with the Union, pursuant to the Union’s demand of September 17.

The facts establish that at the time of the demand, Respondent had hired its entire workforce of two employees, both of whom had been employed at the building by E&M, the predecessor employer. Thus, the obligation of Respondent to recognize and bargain with the Union attaches at the time of the demand when it still employed both of the employees. The analysis required by the Board in successorship cases is governed by the Supreme Court’s decision in *Fall River Dyeing and Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987) and *NLRB v. Burns Security Services*, 406 U.S. 272 (1972).

The relevant principles were summarized by the Board in *Bronx Health Plan*, 326 NLRB 810, 811 (1998) as follows:

In *NLRB v. Burns Security Services*, 406 U.S. 272 (1972), the Supreme Court set forth the criteria for determining whether a new employer is the successor to the prior employing entity. The approach is primarily factual and is based on the totality of the circumstances presented by each case. The Court instructed that the focus should be upon whether there is “substantial continuity” between the enterprises, and whether a majority of the new employer’s employees had been employed by the predecessor. The Court held that, in these circumstances, when one employer takes over the union-represented bargaining unit employees of another employer, it is bound to recognize the union as the collective-bargaining representative of the employees in the unit.

¹⁴ The contract referred to, which covered the employees of E&M at the building, was due to expire by its terms on March 31, 2014.

The Supreme Court revisited the successorship issue in *Fall River Dyeing Corp. v. NLRB*, 482 U.S. 27 (1987), where it reiterated the requirement that a "substantial continuity" must exist between the enterprises before warranting a finding that the new employer is a successor. The Supreme Court in *Fall River*, *supra* at 43, summarized the factors relevant to determining when substantial continuity exists as follows:

[W]hether the business of both employers is essentially the same; whether the employees of the new company are doing the same jobs in the same working conditions under the same supervisors; and whether the new entity has the same production process, produces the same products, and basically has the same body of customers.

The Court also stated that the Board will analyze these factors primarily from the perspective of the employees, that is, "whether 'those employees who have been retained will...view their job situations as essentially unaltered.'" *Id.*, quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973). The Court reiterated that although each factor must be analyzed separately they must not be viewed in isolation and, ultimately, it is the totality of the circumstances that is determinative. See *Fall River*, *supra*.

In applying these principles here, it is clear that Respondent, when it took over ownership and the operation of the building at the same location and hired all of the predecessor's employees, was operating essentially the same business as the predecessor.

It is well-established that the bargaining obligations attached to a finding of successorship are not defeated by the mere facts that only a portion of the former union-represented operation is subject to a sale or transfer to a new owner, so long as the unit employees in the conveyed portion constitute a separate appropriate unit and comprise a majority of the unit under the new operation. *Bronx Health Plan*, *supra*, 326 NLRB at 812; *MS Management Associates*, 325 NLRB 1154, 1155 (1998); *Stewart Granite Enterprises*, 255 NLRB 569, 573 (1981).

Therefore, the fact that the predecessor's contract with the Union covered several other buildings in addition to the building purchased by Respondent does not defeat a successorship finding as long as the "conveyed portion constitutes a separate appropriate unit." *Bronx Health Plan*, *supra*; *MS Management Associates*, *supra*.

Here, a single building is presumptively an appropriate unit, and Respondent has presented no evidence nor even made the contention that such a unit is inappropriate.¹⁵

Therefore, I conclude that the unit of Respondent's employees at 751 Gerard Avenue is an appropriate unit and that Respondent hired its entire staff of two employees (Gomez and McDonagh), who had been employed by E&M, the predecessor employer of these employees, who had been represented by the Union.

In such circumstances, under the principles of *Fall River* and *Burns*, Respondent is

¹⁵ While the evidence establishes that Parkash (individually or through other corporations or LLCs) owns 55 buildings, no evidence was presented or contention made that the appropriate unit must comprise some or all of these other buildings. Indeed, the record is unclear as to whether the Respondent here (Parkash 751 LLC) owns any other buildings.

obligated to recognize and bargain with the Union once the Union makes a demand. The Union made its demand on September 17, and Respondent was obligated to recognize and bargain with the Union at that time.

Respondent's defense that it had no knowledge of the Union or the basis for its demand for recognition, I find to be disingenuous and unavailing. I have found that Respondent, contrary to Parkash's testimony, was aware of the Union's status at the building prior to Respondent's purchase since McDonagh informed him that it was "a union building" during their conversation in the spring, prior to the purchase by Respondent. Further, in my view, Parkash is an experienced businessman, who owned 55 buildings and purchased 751 Gerard Avenue for over one million dollars, would surely have known that the building's prior owners had a union representing its employees.

Thus, Respondent's response to the demand letter and questioning the Union's basis for its demand and its request for proof of its representational status is disingenuous and, in any event, inconsequential.

While the Union never sent a copy of the collective bargaining agreement to Respondent, Respondent was aware of its existence and the Union's status at the building with the predecessor. Further, the Union had informed Respondent that it had a contract with the predecessor employer and the Union's failure to send a copy of the contract to Respondent is not a defense to Respondent's refusal to recognize the Union.

Accordingly, based on the foregoing, I conclude that Respondent had violated Section 8(a)(1) and (5) of the Act by failing and refusing to recognize and bargain with the Union.

C. The Terminations of Gomez and McDonagh

The Board in *Alternative Energy Applications Inc.*, 361 NLRB #139 (Dec. 16, 2014) concisely summarized the mixed motive analysis of the Board in *Wright Line*:¹⁶

In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* on other grounds 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies his initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets his initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 2 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB No. 93, slip op. at 3-4 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the

¹⁶ 251 NLRB 908 (1980)

protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982).

5 In applying these principles here, I conclude that General Counsel has satisfied its initial burden that the protected conduct of Gomez and McDonagh was a motivating factor in Respondent's decision to discharge them.

10 Both Gomez and McDonagh were union members and were represented by the Union when they were employed by E&M, the predecessor employer of these employees. Respondent was aware of this fact when it hired them on September 11, but it did so at substantially lower rates, which the employees accepted, although somewhat reluctantly.

15 During the hiring meeting, I have found that Respondent violated Section 8(a)(1) of the Act when Parkash told the employees that there was no more union in the building and that he didn't accept the Union in his buildings. This 8(a)(1) violation represents substantial evidence of union animus.

20 Further, and most significantly, shortly after the hiring on September 17, the Union made its demand for recognition and bargaining. Respondent declined to recognize and bargain with the Union, responding with a disingenuous letter demanding proof of the Union's representative status while it knew full well that the Union had been the representative of the employees while they were employed by the predecessor.

25 Thus, shortly after the Union made its demand, Respondent terminated both of the employees whom it had hired and which employees had comprised the Union's majority status. McDonagh was terminated on September 30 (although he was notified of his discharge on September 28) and Gomez was discharged on October 4. The timing of these discharges, coming so close to the date of the Union's demand, represented further substantial evidence supporting General Counsel's *prima facie* case for an unlawful termination finding. *Masland Industries*, 311 NLRB 184, 197 (1993) (discharges five days after union's demand).

30

35 Accordingly, I conclude that General Counsel has established that a motivating factor in Respondent's decision to terminate McDonagh and Gomez was protected conduct of the employees.

40 As noted above, that is not the end of the inquiry. It merely shifts the burden of proof to Respondent to demonstrate that it would have terminated the employees, even absent their protected activity. It is to these issues that I now turn.

Starting with Gomez, I conclude that Respondent has fallen short of meeting its burden of proof that it would have terminated him, absent his protected conduct.

45 Parkash testified that he decided to discharge Gomez because after Respondent terminated McDonagh, Gomez's performance, according to Parkash, as a porter deteriorated to the point that he was only working a couple of hours a day and was not properly cleaning the building and because Gomez was living in an illegal apartment in the building.

50 However, the evidence fails to support either of these assertions by Parkash. Notably, Parkash asserts that he relied on alleged reports from supervisors Reyes and Lliguicota that Gomez was not working a full day during the week after McDonagh was terminated, that Gomez was not performing his job of mopping and cleaning and that Lliguicota had been compelled to

bring in extra help to perform the work that Gomez should have performed. However, neither Reyes nor Lliguicota corroborated Parkash's testimony. Reyes did not testify, and although Lliguicota did testify about other issues, he furnished no testimony concerning Gomez's work deficiencies nor any corroboration that he had reported to Parkash any problems with Gomez's work performance or his alleged failure to work a full day. In such circumstances, I find Parkash's testimony of alleged reports from Reyes and Lliguicota not to be credible and insufficient to meet Respondent's burden of proof. Indeed, this lack of corroboration is demonstrative that Respondent's defense was pretextual.

Furthermore, the testimony of Parkash that he terminated Gomez because he was living in an illegal apartment is unworthy of belief and is also demonstrative that Respondent's defense is pretextual. Significantly, the termination letter given to Gomez by Perez made no mention of Gomez's living in an illegal apartment as a reason for his termination nor did Reyes so inform him. Indeed, Reyes never criticized Gomez in any manner, and, in fact, had asked Gomez three days before Gomez was fired whether Gomez was interested in being super in the building. At that time, McDonagh had been terminated, and this is the period of time when Parkash asserts that Gomez was not working and that his supervisors (i.e. Reyes and Lliguicota) so informed him. Therefore, the pretextual nature of Respondent's defense is further demonstrated.

The failure to include Gomez's living in the alleged "illegal apartment" as a reason for his discharge in his termination letter represents significant evidence of shifting reasons for Respondent's discharge of Gomez and supports a finding of pretext and failure of Respondent to meet its burden of proof. *Marquez Bros. Enterprises*, 358 NLRB #61,¹⁷ slip op at 1 (2012) (reason for discharge not stated in discharge letters); *Inter-Disciplinary Advantage*, 349 NLRB 480, 509 (2007) (raising additional allegation at trial for first time in litigation supports finding of pretext).

Further evidence of the pretextual nature of Respondent's defense concerning Gomez's use of the apartment is demonstrated by the testimony of Cabrera, Respondent's own witness, who testified that at another building owned by Parkash, it was discovered that a porter was living in the building without Parkash's knowledge or consent.

However, that employee was not discharged or even disciplined in any way by Parkash but was merely instructed to stop living in the apartment and move out. This blatant evidence of disparate treatment further undermines Respondent's defense and further supports my conclusion that its defense with respect to Gomez was pretextual.

Accordingly, I conclude that Respondent has failed to establish that it would have terminated Gomez absent his protected conduct and that it has, therefore, violated Section 8(a)(1) and (3) by discharging Gomez on October 4.

Turning to McDonagh, while I again conclude as I did with Gomez that General Counsel had adduced sufficient evidence that protected conduct was a motivating factor in McDonagh's discharge, I find that in McDonagh's case that Respondent had met its burden of establishing that it would have terminated McDonagh, absent his protected activity.

In that regard, I found Parkash's testimony credible and supported by the testimony of

¹⁷ *Marquez Bros.*, supra was a *Noel Canning* case and was reaffirmed and adopted with minor changes not related to the above conclusions in 361 NLRB #150 (Dec. 16, 2014).

other witnesses, such as Lliguicota and Cabrera, and to some extent, even by Gomez.

The evidence establishes that Parkash informed McDonagh during their inspection of the vacant apartments on September 16 that two of them, Apartments 4C and 3N, had been
 5 rented and needed to be completed expeditiously so they could be occupied. Apartment 3N needed only a few minor adjustments, including installation of electrical outlet covers and installation of a stove and refrigerator and that Parkash informed McDonagh he would need the apartments completed right away. McDonagh assured Parkash that he would do the tasks assigned to him.

10 Apartment 4C, according to McDonagh, was 95% completed and needed only some grout work in order to be finished. However, I do not credit McDonagh's testimony in this respect, and I conclude that the testimony of Respondent's witnesses, Parkash, Cabrera and most significantly, corroborated by the bill from Ajay Construction Company, the contractor
 15 utilized by Respondent to perform the work in this apartment that McDonagh did not perform, established that a number of items in addition to grout work still needed to be done. They included installation of a bathroom vanity, installation of bathroom doors and molding, finish electrical work, installation of shelves and poles, installation of additional kitchen cabinets and cleaning up the apartment.

20 Parkash asked McDonagh how long it would take to complete the work needed, and McDonagh replied two or three days.

25 Apartments 5F, 6J and 6K were apartments, where tenants had been evicted and/or vacated the apartments. The tenants had left furniture, pots and pans and personal items as well as garbage in the apartments. Parkash instructed McDonagh to remove all of these items from the apartments, and McDonagh replied that he would do it.

30 The next day, September 17, Parkash visited the building, and although McDonagh was not present, Gomez had the keys, so they inspected Apartments 6J and 6K. They were still filled with the belongings of the previous tenants. Through Roman, Parkash instructed Gomez to tell McDonagh to clean out these two apartments. Gomez responded that he will tell the super.

35 At 3:15 PM as he was leaving the building, Parkash ran into McDonagh, who was coming in the back door. Parkash informed McDonagh that Apartments 3N and 4C needed to be completed, so that the tenants could move in. McDonagh agreed that he will do what Parkash instructed him to do in these apartments.

40 However, on September 18, Reyes reported to Parkash that nothing more had been done with either of these two apartments.

45 Thus, on September 19, Parkash went to 751 Gerard Avenue at 1:00 PM and inspected Apartments 3N and 4C and saw that they were in the same condition as they had been when originally inspected and that McDonagh had not completed the tasks assigned to him previously and that McDonagh had promised to perform. Parkash confronted McDonagh, told him that he was very upset, that McDonagh was not doing his job and added that if this work was not done by tomorrow (September 20), McDonagh will be terminated.

50 McDonagh replied that he will work the next few days and get the apartments ready.

On September 21, Parkash went to the building and noticed that Apartment 3N had been completed but not 4C or the other apartments that McDonagh had been asked to finish.

On September 23, Parkash returned to the building and met with McDonagh. They inspected apartments 4C, 5F, 6J and 6K, which were the four remaining apartments still not completed by McDonagh as instructed. No work had been done in any of these apartments. Parkash asked McDonagh how many days he would need to finish the work in Apartment 4C and remove the garbage and other materials from Apartments 5F, 6J and 6K. McDonagh responded four or five days. Parkash replied, Ok, I have no problem with that. Thus, although Parkash had threatened to terminate McDonagh by September 20 if he did not complete work on Apartments 3N and 4C, Parkash relented (apparently since McDonagh had finished Apartment 3N) and decided to give McDonagh another chance to finish Apartment 4C and agreed to give McDonagh until September 27 as McDonagh had suggested to complete the work in that apartments as well as to empty out the contents of Apartments 5F, 6J and 6K as instructed.

However, on September 28, Parkash returned to the building, inspected the four apartments and observed that McDonagh had not done anything more in any of them and had not met his commitment to perform the work by September 27. Parkash informed McDonagh that he was very disappointed with McDonagh's work and that and he was going to terminate McDonagh. McDonagh replied that he doesn't care, "he belongs to the Union."

McDonagh was given his termination letter on September 30 by Reyes.

In these circumstances, I conclude that Respondent has demonstrated that it would have terminated McDonagh, absent his protected conduct.

The above facts demonstrate that McDonagh repeatedly failed to perform tasks assigned to him, failed to meet deadlines that he himself agreed to perform the assignments and had been warned previously that failure to complete some of these assignments would result in his termination.

Yet, despite Respondent having given him several chances to perform his assignments, he still did not do so and was finally terminated for failing to perform his job. Notably, the assignments that he failed to complete included Apartment 4C, the apartment that he had previously been warned that he would be terminated if he did not complete it earlier, but Respondent gave him another few days at McDonagh's suggestion to finish that apartment along with the other three vacant apartments.

In this regard, General Counsel argues that the work in Apartment 4C that McDonagh was instructed to perform was beyond the regular duties of the super and that, in fact, Parkash admitted that to be so and that Parkash had not discussed or even decided how much extra money to pay McDonagh for completing this work. I find this argument misplaced and unconvincing. While it is true as General Counsel asserts that most of the work that needed to be done in Apartment 4C was in that category and might require extra pay, this has no relevance to why the work was not performed. McDonagh did not testify nor does the evidence reflect that McDonagh did not perform the work assigned to him and which he agreed to do because he didn't know how much extra pay he would be receiving for this work. Indeed, McDonagh provided no explanation for not completing this assignment other than that he was waiting for the grout, which testimony I found not credible since there was significantly more work to be done in that apartment in addition to grout work.

The bottom line is that McDonagh was told that this apartment had been rented, needed to be ready for occupancy, was threatened with discharge if he did not do it, given another

chance and was provided with several more days to complete the job and inexplicably still failed to meet his own commitment to perform this work in the time promised. This conduct by itself would be sufficient to warrant termination.

5 Here, however, McDonagh also failed to remove the contents of three other apartments as instructed by Parkash on more than one occasion.

McDonagh's defense for not performing these assignments was not persuasive and not supported by the evidence. McDonagh testified that he was waiting for help from Parkash that he asked for and that, in fact, the four individuals brought in by Respondent to clean out these apartments was the help he was waiting for. McDonagh further testified that both he and Gomez helped to remove some but not all of the contents of these apartments. However McDonagh's testimony is contradicted by both Lliguicota and Gomez, who testified that the removal of the contents of these apartments came after McDonagh was fired and was performed only by Lliguicota and the other individuals and that neither Gomez nor McDonagh participated in the removal.

There can be no argument, and General Counsel had not contended, that the removal of the contents of these apartments are tasks not normally part of the super's job.

Accordingly, I conclude that the evidence establishes that Respondent gave McDonagh several chances to perform his assigned tasks, including a warning that termination would result if it was not completed in a timely fashion and that McDonagh failed to comply with his own self-determined commitment to complete the work by September 27. His failure to meet this commitment resulted in his discharge, and I find that Respondent would have taken his action, absent McDonagh's protected activity.

I, therefore, recommend that the 8(a)(1) and (3) allegation with respect to McDonagh's discharge be dismissed.

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Conclusions of Law

1. Respondent, Parkash 751 LLC, is an employer engaged in commerce within the meaning of Section 2(2)(6) of the Act.

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2. Local 670, Retail Wholesale Department Store Union, United Food and Commercial Workers is a labor organization within the meaning of Section 2(5) of the Act.

3. The Union has been and is the exclusive collective bargaining representative for Respondent's employees in the following appropriate unit:

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All of the employees, excluding supervisory employees, employed by the Respondent in the building located at 751 Gerard Avenue, Bronx, New York.

4. Respondent has violated Section 8(a)(1) of the Act by informing applicants for employment and employees that there was no more union in the building and that it didn't accept the Union in its buildings.

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5. Respondent had violated Section 8(a)(1) and (5) of the Act since September 17, 2013 by refusing to recognize and bargain with the Union.

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6. Respondent has violated Section 8(a)(1) and (3) of the Act by discharging its

employee, Ruben Gomez, because of his membership in and activities in support of the Union.

7. The Respondent did not violate the Act in any other manner as alleged in the complaint.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent had engaged in certain unfair labor practices, I shall recommend that it cease and desist and take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that Respondent unlawfully discharged Ruben Gomez, I shall recommend that Respondent offer to him full reinstatement to his former job, absent the Respondent's unlawful discrimination, or, if that position no longer exists, to a substantially equivalent position without prejudice to his seniority and other rights and privileges enjoyed, discharging if necessary any employee hired in his place. Gomez shall be made whole for any loss of earnings he may have suffered due to the discrimination practiced against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1187 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files any reference to the unlawful discharge and to notify Gomez in writing that this has been done.

Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express*, 361 NLRB No. 137 (2014).

Further, having found that Respondent unlawfully refused to bargain collectively with the Union, I shall recommend that the Respondent, on request, recognize and bargain with the Union concerning wages, hours, benefits, and other terms and conditions of employment, and if an agreement is reached reduce the agreement to a signed written contract.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁸

ORDER

The Respondent, Parkash 751 LLC, Jamaica, New York and Bronx, New York, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Informing applicants for employment or its employees that there was or is no more union in the building or that it did not accept the Union in any of its buildings.

¹⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Refusing to recognize and bargaining in good faith with Local 670 Retail Wholesale Department Store Union, United Food and Commercial Workers (the Union).

5 (c) Discharging or otherwise discriminating against employees because of their membership in or activities in support of the Union.

(d) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive representative of the employees in the below described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

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All of the employees, excluding supervisory employees, employed by the Respondent in the building located at 751 Gerard Avenue, Bronx, New York.

20 (b) Within 14 days of the date of this Order, offer Ruben Gomez full reinstatement to his former position or, if such position no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any employees hired in his place.

25 (c) Make Ruben Gomez whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

30 (d) Compensate Ruben Gomez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

35 (e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

40 (f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

45 (g) Within 14 days after service by the Region, post at its Jamaica, New York and Bronx, New York facilities copies of the attached notice marked "Appendix."¹⁹ Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60

50 ¹⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.

5 Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 11, 2013.

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(h) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

15 Dated, Washington, D.C. January 22, 2015

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Steven Fish,
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT inform you or applicants for employment or our employees that there was or is no more union in the building or that we do not accept the Union in any of our buildings.

WE WILL NOT refuse to recognize and bargaining in good faith with Local 670, Retail Wholesale Department Store Union, United Food and Commercial Workers (the Union) as the exclusive collective-bargaining representative of our employees in the following appropriate unit:

All of the employees, excluding supervisory employees, employed by the Respondent in the building located at 751 Gerard Avenue, Bronx, New York.

WE WILL NOT discharge or otherwise discriminate against you because of your membership in or activities in support of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union as the exclusive representative of the employees in the above described unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement.

WE WILL within 14 days of the date of this Order, offer Ruben Gomez full reinstatement to his former position or, if such position no longer exists, in a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, discharging, if necessary, any employees hired in his place.

WE WILL make Ruben Gomez whole for any loss of earnings and other benefits he may have suffered by reason of our unlawful discharge, less any net interim earnings, plus interest.

WE WILL file with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL compensate Ruben Gomez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Ruben Gomez and WE WILL, within 3 days thereafter, notify in writing that this has been done and that the discharge will not be used against him in any way.

PARKASH 751 LLC

(Employer)

Dated _____

By _____

(Representative)

(Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100

Brooklyn, New York 11201-4201

Hours: 9 a.m. to 5:30 p.m.

718-330-7713

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-114742 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.